DRURY *v.* FOSTER.

A paper, executed, under seal, for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one *bonâ fide* and without knowledge of the mode of execution. The mortgagee, on cross-bill to a bill of foreclosure, was directed to cancel *her* name.

FOSTER, of Minnesota, being about to engage in some enterprise, and wanting money, asked his wife, who owned, in her separate right, a valuable tract of land in that State, to mortgage it for his benefit. What exactly was said or promised did not appear. However, Foster afterwards went to a notary, who exercised, as it seemed, the business of a scrivener also, and directed him to draw a mortgage of the property, with himself and wife as mortgagors, but leaving *the name of the mortgagee, and the sum for which the land was mortgaged, in blank.* This the magistrate did. Foster acknowledged the deed, at the magistrate's office, *in this shape*, and the magistrate then took the instrument to Mrs. Foster, at her husband's house, that she might sign and acknowledge it in the same shape. When the magistrate took the mortgage to her thus to execute, Mrs. Foster said, "she was fearful that the speculation which her husband was going into would not come out right; *that she did not like to mortgage that place*, but that he wanted to raise a few hundred dollars, or several hundred dollars, or something to that effect,"—the magistrate, who was the witness that gave the testimony, did not recollect the exact expression which she used,—"and that she did not like to refuse him, and that so she consented to sign the mortgage." Mrs. Foster, having signed the instrument in *this blank shape*, the notary, under his hand and seal, certified, in form, that the husband and wife. "the signers and sealers of the *foregoing deed*," had personally appeared before him, "and acknowledged the signing and sealing *thereof* to be their voluntary act and *deed*, for the uses

and purposes expressed;" and that the wife, "being examined separate and apart from her said husband, and the contents of the foregoing deed made known to her by me, she then acknowledged that she executed the same freely, and without fear or compulsion from any one." Such form of separate acknowledgment, it may be well to say, is required by statute, in Minnesota, to give any effect to a *feme covert's* deed. After taking the wife's acknowledgment, the notary gave the instrument to her husband. He, finding the complainant, Drury, willing to lend as much as $12,800 upon the property, himself filled up the blanks with the name of Drury, as mortgagee, and with the sum just mentioned as the amount for which the estate was mortgaged. In this form the instrument was delivered to Drury, who, knowing nothing of the facts, advanced the money in good faith, and put his mortgage on record. There was no evidence that the wife derived any benefit from the money advanced, or that she ever knew that such a large sum was advanced.

On a bill of foreclosure brought four years afterwards by Drury against Foster and wife, in the Federal Court for Minnesota, the defence was, that the mortgage was not the wife's deed; a defence which the court below thought good as to her. It accordingly dismissed the bill as regarded her, giving a decree, however, against the husband. The correctness of its action as regarded the wife was the question, on appeal, here.

Mr. Peckham for Drury, the mortgagee: All will admit that it is not easy to conceive of a case addressing itself more to a sense of equity. Drury, without a circumstance to excite suspicion, and relying upon a mortgage regular upon its face, advanced a large sum in perfect good faith. He supposed, too, as was natural, that the mortgagors were acting in equal good faith. Mrs. Foster deliberately, and with understanding, put it into the power of her husband to obtain the loan. Will she be permitted, at this late day, in conjunction with her husband, to disavow her acts, and thus, in effect, defraud an innocent third party whom she has been

chiefly instrumental in bringing into his present position? Even if Mrs. Foster were entirely innocent in the premises, and was the victim of the fraud of her husband, yet either she or the plaintiff must suffer loss in the present case; and no principle is better settled than that where loss must fall upon one of two innocent parties, it must be borne by that one who is most in fault. There is no reason for exempting the wife from the operation of this rule. On the contrary, in transactions between the husband and wife and third parties, there is the strongest reason for applying the principle. It would be against public policy, and expose transactions relative to real estate to hazard, to allow a married woman to screen herself from the consequences of her own acts under the circumstances of the present case. Such a doctrine would subordinate all other interests to those of married women.

Viewed on legal principles, the conclusion is to the same effect. It is of no pertinence to cite, in this day and this country, "technical dogmas," as Grier, J., calls them,* out of Shepherd's Touchstone, or Perkins. These old books may, indeed, declare, "that if a man seal and deliver an empty piece of paper or parchment, albeit he do therein withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed."† But such doctrines have been exploded, even in England, these two hundred years. Certainly the contrary, as respected a bond, was adjudged in *Zouch* v. *Claye*, 23 and 24 Charles II, in the days of Norman French and of black-letter law. Levinz thus reports the case:‡

"Det sur obligation. Le case fuit tiel. A. and B. seal and deliver le bond a C., et puis per le consent de touts les parties le nom et addition de D. fuit interline, et il auxy seal l'obligation et ceo deliver. Et si l'obligation per cest alteration fuit faet void vers A. and B. fuit le question. Et per Hale et totam curiam adjudge que nemy."

* Mercer Co. *v.* Hacket, 1 Wallace, 85.

† Shepherd's Touchstone, 54; Perkins, § 111; Co. Lit. 171.

‡ 2 Levinz, 35.

Argument for the mortgagee.

"Debt on bond. The case was this. A. and B. seal and deliver a bond to C.; and then, with the consent of all parties, the name and addition of D. was interlined; and *he* also sealed the bond and delivered it. The question was whether, owing to this alteration, the bond was void as respected A. and B. And by Hale, and the whole court adjudged that it was not."

Texira v. *Evans*, cited in *Master* v. *Miller*, and reported by Anstruther,* A. D. 1793 (Lord Mansfield's time), did but affirm this old adjudication. There, Evans wanted to borrow £400, or so much of it as his credit should be able to raise. For this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. Texira lent £200 on it, and the agent accordingly filled up the blanks with the sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed.

The principle was early enunciated in America. Chief Justice Parsons, in delivering the judgment in *Smith* v. *Crooker*,† where a bond had been executed by a surety before his name had been inserted in the body of the instrument, and his name being afterwards inserted therein in his absence, holding the instrument valid, remarks: "The party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." *Ex parte Kerwin*‡ is a later case, one in New York. It was there held, that an appeal bond drawn in blank as to the recital of the judgment, and executed by the appellant and his surety, the former giving parol authority to his surety to ascertain from the justice the amount of the judgment, and fill up the blank accordingly, and deliver the bond for both, and which was done, was a good bond. This is similar to the case at bar, in the respect that the agent for the insertion of the blanks and delivery of the instrument was one of the co-obligors.

* Vol. 1, p. 228 † 5 Massachusetts, 539. ‡ 8 Cowen, 118.

Many other American cases are to the same point.* This relaxation of ancient technicality is universal in our new Western States. There people deal with lands as they do with oxen; and pass a fee simple to a hundred acres with as much facility as they do the title to a plough or a cart.†

We assert, and the cases just cited prove, that a paper under seal, executed with blanks, becomes, when those blanks are filled up, and the instrument is afterwards delivered, the party's deed. And it is difficult to see why a contrary view should be entertained. Parol authority is confessedly sufficient for the mere delivery of a deed. But delivery is the act of acts. It is the act by which each and all of the other acts necessary to the execution of the deed become operative and effectual. By it the signing, the sealing, and the acknowledgment take effect. If, therefore, delivery can be made under parol authority, why may not blanks be filled in, and alterations and interlineations made in deeds before their delivery by like authority? Neither of these things constitute the execution of a deed, but are merely acts necessary to be performed in the execution thereof; acts consummating and giving effect to the execution.

The fact that the party making this deed was a *feme covert* is unimportant. What an ordinary person may do without examination, a *feme covert* may do when separately examined. If an ordinary person, without examination, may execute a deed with blanks, a *feme covert* may execute a similar deed, provided she be separately examined, know fully what she does, and it be plain that it was such a deed she wished and meant to execute. Why not? Certainly she could convey her whole estate, if it were conveyed by deed, whose blanks were filled. Why may she not convey a portion whose extent remains undefined, if she has wished and meant so to do? Her real wishes, her perfect knowledge of what she is

* Sigfried *v.* Levan, 6 Sergeant & Rawle, 308; Wiley *v.* Moore, 17 id. 439; *Ex parte* Decker, 6 Cowen, 59; Anderson *v.* Lewis, 1 Freeman's (Mississippi) Chancery, 178.

† See what is said by Miller, J., *post*, Miles *v.* Caldwell.

doing, her entire freedom from the husband's coercion and compulsion, these are the points to which the law looks; and these being settled, her capacity is as great as if *dis-covert.* In this case, when separate and apart from her husband, Mrs. Foster gave her voluntary consent to a sealed instrument, with blanks; in that same manner, she authorized these blanks to be filled at the discretion of her husband, to whom she knew it would be handed over.

But even if not her deed, Mrs. Foster is *estopped* from asserting that she did not execute the mortgage. The mortgage in question was duly signed, sealed, acknowledged, and certified to, with the name of the grantee and the amount of the mortgage debt in blank, and was, when so signed, sealed, and acknowledged, well known to both grantors to contain these blanks. The conclusion, therefore, is, that the blanks were designedly left by both grantors to facilitate the negotiation of the loan, which was the avowed object of the execution of the mortgage, well known to and understood by Mrs. Foster, as appears by her own declarations made to the notary public at the time, and because the amount and terms of the loan which her husband might succeed in effecting, and the party of whom he might make it, were at the time unknown to either grantor. The mortgage having been thus deliberately, and with understanding, executed in such form and for such purposes by both parties, was, with the full knowledge and deliberate consideration of Mrs. Foster, delivered by her to the notary, to be by him delivered to the other grantor, her husband, which was accordingly done; and this mortgage, with all the blanks filled in, and in all respects perfect, was delivered by Foster to Drury, the complainant. The doctrine of estoppel *in pais*, thus laid down by Lord Denman,* applies to such a case: "The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the

* Packard *v.* Sears, 6 Adolphus & Ellis, 469.

former is concluded from averring against the latter a different state of things as existing at the same time."

There is yet another ground why this decree, as respects the wife, should be reversed. Evidence was introduced by Mrs. Foster, for the purpose of showing that, at the time of the signing, sealing, and acknowledgment of the mortgage, there were blanks in it; and this evidence was introduced upon the theory that, there being such blanks at such time in the mortgage, this deed was *no deed*, at least so far as defendant, Mrs. Foster, was concerned. This evidence tended to contradict, and was introduced for the purpose of contradicting, the certificate of acknowledgment, and showing the same to be false; whereas, on the highest ground of public policy, such certificates are held to be *conclusive* evidence of the matters they contain, and they can neither be *aided* nor *disproved* by parol testimony, except, perhaps, in cases of fraud or imposition. In *Jordan* v. *Jordan*,* Tilghman, C. J., recognizing this principle, said: "There would be no certainty to titles if that kind of evidence were permitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else." The case of *Jamison* v. *Jamison*,† subsequently decided by the same court, is nearly parallel to the one at bar. It was the case of a mortgage executed by husband and wife, of the separate estate of the wife to secure the debt of the husband; and in which there was an offer to prove, by the testimony of the justice of the peace before whom the acknowledgment was taken, that his certificate thereof was false. The court held that the certificate of the judge or justice to the acknowledgment of a deed by a married woman, is to be judged of solely by what appears on the face of the certificate itself; and that parol evidence of what passed at the time of the acknowledgment is not admissible for the purpose of contradicting the certificate.

Mr. Carlisle, contra: Whatever interest the husband had, passed, we concede, by the decree. What we assert is, that

* 9 Sergeant & Rawle, 268. † 3 Wharton, 468.

Mrs. Foster's estate in the land was never conveyed. She never executed any *deed* in the premises. She signed, sealed, and acknowledged, but never delivered, a blank form of a deed of mortgage, containing no name of the grantee, or mortgagee, no statement or recital of the sum of money to be secured, or the time of payment; or, in short, of any of the matters indispensable to make the deed operative, except the names of the grantors and the description of the property. It was an instrument which conveyed nothing, because there was no grantee. It was an unfinished mortgage in form; but it was no mortgage at all, because there was no mortgagee and no debt, recited, described, or in any manner indicated. It consists, in natural reason, as well with Mrs. Foster's declaration at the time she signed it, that it was intended to be a security for "a few hundred dollars," as with the complainant's claim for $12,785; and it might as well have turned out a mortgage for a million of dollars. And because it was thus absolutely wanting in certainty, and might be anything, or nothing, when it was signed and acknowledged by Mrs. Foster, it was not, and could not become, her deed in law.

To say that Mrs. Foster is estopped from denying that she executed the mortgage, because she signed, sealed, and executed it, is a *petitio principii*, simply.

The fact that Mrs. Foster was a married woman *does* make a potential element of the case. Observe the statement of the case! "She was *fearful* that the speculation which her husband was going into would not come out right: she did not like to mortgage *that* place;" her paternal property, perhaps, the home of her own childhood. "But *he*"—her husband—wanted to raise money, and "she did not *like* to refuse him, and *so* she consented to sign." The case is an affecting illustration of the extent to which a woman becomes, in marriage, "subdued to the very quality of her lord." Her woman's fears had foreseen what her husband's intelligence never suspected; but like a woman, lovely and confiding, she yielded everything to *him*. This court will surely remember the language of Marshall, C. J., in *Sexton* v. *Whea-*

*ton:** "All know and feel the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend upon that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other." Does any one doubt, if this magistrate—the great offender in the case—had done the duty which the laws of the State from which he derived his commission put upon him; that is to say, had refused to take any acknowledgment till the blanks in the deed were filled with $12,800, and its contents, in fact and in truth and spirit made known to the lady—that however Mrs. Drury might have "*so* consented," not "*liking to refuse him*," the magistrate could never have certified that she executed it "freely." This separate examination, if faithfully made—this certificate, itself a certificate of *quasi* judicial approbation to what she does—if conscientiously given; given, as with the body of our higher magistracy we may hope that it only is given; is the protection with which the law hedges the gentle nature of a woman—her crowning grace and glory—from the dangers, and perhaps the ruin, which, without the law's protection, it is certain in many cases to bring upon her. The argument which treats her as an independent person, and would approximate her actions to those of our own sex—which would say that *all* that a man may do without examination, she may do *if* examined—violates the central germ of truth upon the subject, the law of the inherent moral differences of our natures; the true and fine conception of the case, which gives to characters, thoughts, passions, sentiments, and all things within, their sex. A certificate in blank is an absurdity, as respects a married woman, if we look to the wise reasons of the law. By law, such a woman has no power to convey her estate at all. The law gives it to her on condition that she be examined separately, and consent fully and freely to the exact thing which she does. The certificate must have been in fact, and when made a true certificate; and everything certified

* 8 Wheaton, 229; 1 American Leading Cases, 42.

to have been done by the *feme covert* must have been exactly and specifically done.

It is objected that the parol proof tends to contradict the official certificate of acknowledgment, and cases are cited in support of this objection. But they have no application. Here is no attempt to aid a defective certificate of acknowledgment, as in some of the cases cited. Nor is it an attack, by parol proof, upon *a perfect certificate.* It is simply proof of *what the instrument was* which was so acknowledged and certified; that it *was not then* the instrument which is produced by the complainant.

Mr. Justice NELSON delivered the opinion of the court.

By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a *feme covert,* is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint.

Now, it is conceded, in this case, that the instrument Mrs. Foster signed and acknowledged was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted. Although it was, at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient.

But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the *feme covert* and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.

It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *feme coverts*. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated.

There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that acts of the officer for this purpose are judicial and conclusive. We express no opinion upon the soundness of this doctrine, as it is not material in this case. The case before us is very different. There is no defect in the form of the acknowledgment, or in the private examination. No inquiry is here made into them. The defect is in the deed, which it is not made the duty of this officer to write, fill up, or examine, and for the legal validity of which he is no way responsible. The two instruments are distinct. The

deed may be filled up without any official authority, and may be good or bad. The acknowledgment requires such authority. The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was, therefore, nugatory. The truth is, that the acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*. The argument in support of its validity would be equally strong.

Our opinion is that, as it respects Mrs. Foster, the mortgage is not binding on her estate.

We may regret the misfortune of the complainant from the conclusion at which we have arrived; but it seems to us impossible to extend the relief prayed for by the bill of foreclosure, without abrogating the protection which the law for ages has thrown around the estates of married women. Losses of the kind may be guarded against, on the part of dealers in real estate, by care and caution; and we think that this burden should be imposed on them, rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life, even when all the privileges with which the law surrounds them are left unimpaired.

DECREE AFFIRMED.

N. B. A decree made below, on a cross-bill ordering the mortgagee to cancel the wife's name on the mortgage, was affirmed here. The cross-bill set up, substantially, the facts disclosed in the answer to the original bill; and the proofs taken in each case were the same.

MILES v. CALDWELL.

1. The established rule, that where a matter has been once heard and determined in one court (as of law), it cannot be raised anew and reheard in another (as of equity), is not confined to cases where the matter is made patent in the pleadings themselves. Where the form of issue in the trial, relied on as estoppel, is so vague (as it may be in an action of ejectment), that it does not show precisely what questions were before